



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Determination Regarding A Request for a 18 U.S.C. § 208(b)(1) Waiver

FROM: Kevin Minoli *K Minoli* 12/3/15
Principal Deputy General Counsel and
Designated Agency Ethics Official

TO: Phillip Brooks, Director
Air Enforcement Division
Office of Enforcement and Compliance Assurance

I am writing in response to your request for an individual waiver pursuant to 18 U.S.C. Section 208(b)(1) to allow you to resume your duties as the Director of the Air Enforcement Division in the Office of Regulatory Enforcement, which is part of the Office of Enforcement and Compliance Assurance in the United States Environmental Protection Agency (hereinafter the Agency or EPA). You have held this position since March 14, 2010. Currently, the Air Enforcement Division is considering an enforcement action against Volkswagen Group (VW) and its subsidiaries with respect to claims that VW inserted software defeat devices in some of its diesel vehicles. In July 2015, you purchased a 2015 Audi A3 diesel vehicle. At the time of your purchase, you had no knowledge about any potential enforcement action against VW, which owns Audi.

On September 18, 2015, you signed a Notice of Violation asserting that, in violation of the Clean Air Act, VW had inserted a defeat device in several classes of vehicles, including the model that you had purchased¹. At the time of your participation, you assumed that car ownership was like any other consumer transaction and not likely to present an actual conflicts issue. On October 9, 2015, you contacted Justina Fugh, Senior Counsel for Ethics, to ask whether potential inclusion in a class action lawsuit could be a disqualifying financial interest. In an abundance of caution, you were advised to recuse yourself from further participation in the VW issue until a final determination could be made. You have remained recused since October 9, 2015.

¹ The affected diesel vehicles listed in the September NOV are: Audi A3 (model years 2009-2015), VW Jetta TDI (model years 2009-2015), VW Jetta SportWagen TDI (model years 2009-2015), VW Golf TDI (model years 2010-2015), VW Golf SportWagen TDI (model year 2015), VW Beetle TDI (model years 2012-2015), VW Beetle Convertible TDI (model years 2012-2015), and VW Passat TDI (model years 2012-2015).

Because of the concern about a possible conflict of interest, the Office of General Counsel consulted with the Office of the Inspector General (IG). The IG declined to open an investigation and will not refer this matter to the Department of Justice (DOJ).

I want to begin by stressing the importance of the Federal laws regarding conflicts of interest of Federal employees. These laws are critical to ensuring public confidence that government employees are working with the interests of the public in mind, and are not swayed by their personal interests. Waiving one of these provisions should be done rarely, and only when granting the waiver is clearly in the interest of the United States.

You seek an individual waiver to allow you to continue to work on the VW specific party matter, even though you personally own one of the affected vehicles sold in the United States. Your vehicle could be affected by a government-mandated recall or other action, and you could be a member of a class action lawsuit. Based on the unique circumstances of this situation and to avoid even the appearance of any conflict, I am granting you an individual waiver of the requirements of 18 U.S.C. § 208(b)(1). Your appointing official, the Assistant Administrator, agrees to this waiver.

Your Role As It Relates to the VW Matter

Your position of record is as the Director of the Air Enforcement Division, and you report to the Director of the Office of Civil Enforcement, who in turn reports to the Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance (OECA). In this career SES position, you are responsible for overseeing the civil enforcement of all provisions of the Clean Air Act. You manage a staff of approximately forty employees, including subordinate supervisors, attorneys and non-attorneys, and you and your staff work directly with the DOJ on civil enforcement actions arising under the Clean Air Act. But for your ownership of an affected vehicle, you would be expected to lead a team of EPA enforcement attorneys working with the DOJ on the VW specific party matter.

Without your participation, EPA referred the September 2015 NOV to the DOJ for enforcement and recently issued a second NOV to VW on November 2, 2015 that expanded the number of affected VW-related vehicles to include 3.0 liter diesel engines². Nearly 500,000 vehicles sold in the United States are affected, and nearly 11 million worldwide. The potential remedies in the EPA enforcement action include injunctive relief, civil penalties (any criminal enforcement is not within the purview of your office) and mitigation of the environmental damage. As part of the injunctive relief, VW may be required to recall the vehicles covered by the NOV.

² The additional affected diesel vehicles listed in the November 2015 NOV are: Audi A6 Quattro (model year 2016), Audi A7 Quattro (model year 2016), Audi A8 (model year 2016), Audi A8L (model year 2016), Audi Q5 (model year 2016), Porsche Cayenne (model year 2015), and VW Touareg (model year 2014).

The Financial Interest at Issue

In July 2015, you purchased a 2015 Audi A3 diesel vehicle for \$^{Lease}24,999. It is not your only personally owned automobile. The September 2015 NOV described the affected diesel vehicles as those classes manufactured between 2009 and 2015, and those classes were categorized into three "Generations" based on engine design. Generations 1 and 2 include vehicles designed and built between 2009 and 2014, while Generation 3 includes vehicles designed and built in 2015. Your vehicle is in Generation 3. At the time of your purchase, you had no knowledge about the emissions defeat software or of any potential enforcement action against the car manufacturer.

Typically, a routine consumer purchase does not trigger concerns about the appearance of conflicts of interest. This case is different, however, given your role as the Air Enforcement Division Director, and the fact that the Clean Air Act enforcement action may contemplate recall or retrofitting of your vehicle. Similarly, it is also possible that you may be a putative class member in pending civil litigation against VW in relation to the installation of defeat devices. It is therefore foreseeable that the outcome of an enforcement action could have a potential direct and predictable effect on your personal finances. Although the outcome of litigation may be remote at this point in time, I have determined that the issuance of a waiver in this case is appropriate out of an abundance of caution.

Your Efforts to Obtain and Abide By Ethics Counselling

Though you participated in the September NOV and in briefing Congress, you did not think that ownership of a vehicle would trigger conflicts concerns. On October 9, 2015, you contacted Justina Fugh, Senior Counsel for Ethics, to ask whether possible inclusion as a member of a class action lawsuit may raise ethics issues. At that time, you provided her with the relevant facts and, as a prudential measure, she advised you to recuse from any further participation. You have remained recused since that date.

The Legal Standard

Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in an official capacity in particular matters in which they have a personal financial interest or in which certain persons or organizations with which they are affiliated have a financial interest. The statute is intended to prevent employees from allowing personal interests to affect their official actions and to protect government processes from any actual or apparent conflict of interest.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a

special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the otherwise disqualifying financial interest at issue arises from your ownership of the affected vehicle. Because contemplated remedies of the enforcement action may include actions taken by the manufacturer to affect car owners directly, we are concerned that there may be a direct and predictable financial effect between your participation in the enforcement action and your ownership of the vehicle.

The financial conflict of interest statute at 18 U.S.C. § 208 provides for the possibility of a waiver of the requirements of the provision:

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee[.]

Your Request for a Waiver

We anticipate that the VW enforcement action will involve significant Agency resources and coordination with DOJ as well as other federal agencies, including the Federal Trade Commission and the National Highway Transportation Safety Administration. Your expertise in complex mobile source cases, including ones against companies that have manufactured or installed defeat devices, while at EPA and, prior to that, at DOJ's Environment and Natural Resources Division, will assist EPA and the United States in this high-profile and complex specific party matter.

Application of Applicable Law to Your Request for a Waiver and Decision

As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the service that the Government may expect from you, the employee. Before I render a decision I must first, pursuant to 5 C.F.R. § 2640.303,

consult with the Office of Government Ethics, where practicable, which has been done.

As stated at the outset of this memorandum, Federal conflict of interest laws are critical to ensuring Federal employees have the interests of the United States – and not their personal interests – in mind when performing their responsibilities as a Federal employee. In this situation, I am concerned that your ownership of an affected Generation 3 vehicle presents the potential for a financial conflict of interest of the sort prohibited by 18 U.S.C. § 208, absent a waiver or exception.

Having applied the applicable law and Office of Government Ethics guidance to the unique facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the service that the Government may expect from you in participating in this case. I therefore grant you this waiver from the prohibitions contained in 18 U.S.C. § 208.

Legal Analysis

As articulated in the statute itself and guidance from the Office of Government Ethics, the key question for a deciding official is whether the otherwise disqualifying financial interest involved is or is not so substantial as to be deemed likely to affect the integrity of the service that the Government may expect from the employee. In applying the factors articulated by the Office of Government at 5 C.F.R. § 2640.301(b), I find that:

- You are the person who owns the affected vehicle;
- You own a Generation 3 vehicle, which is less problematic in terms of retrofitting compared to Generations 1 and 2;
- Your participation in the VW enforcement action may contemplate remedies that will affect individual car owners;
- You have voluntarily agreed to take any and all steps necessary and appropriate to effectively opt-out or otherwise waive any interest, including imputed interests, arising from membership in civil or class action litigation arising from the alleged installation of defeat devices by VW;
- Your prior expertise and demonstrated knowledge in similar complex mobile source cases will be of significance to EPA and the United States, and the DOJ supports your participation; and
- You will not be the decision-maker in any settlement of the enforcement action based on the NOV. Within EPA, any settlement will be reviewed by the Director of Office of Civil Enforcement, with the final decision made by the Assistant Administrator for OECA.

I have considered these factors carefully and find that your ownership interest “is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from [you].”

Impartiality Concerns

Because you will be participating in a specific party matter, I have also considered the application of 5 C.F.R. § 2635.502, which establishes regulatory considerations for employees to undertake to avoid actions that might raise the appearance of a conflict of interest. As a waiver of 18 U.S.C. § 208(a) also acts as an authorization permitting an employee to engage in an activity notwithstanding the potential appearance considerations, *see* 5 C.F.R. § 2635.501, Note, I have also analyzed whether a reasonable person would question your impartiality in this matter and whether your participation was warranted regardless of such an appearance. 5 C.F.R. §§ 2635.502(c), (d).

In this regard, I have considered two matters: first, that the enforcement action may have a direct and predictable future financial effect on you and your immediate family as owners of an affected vehicle and, second, that affected diesel owners have been offered a "goodwill" package from VW that includes a \$500 Volkswagen Prepaid Visa Loyalty Card, a \$500 Volkswagen Dealership Card, and no-charge 24-hour Roadside Assistance for three years.

In relation to the first matter, as noted above, your prior expertise and demonstrated knowledge in similar complex mobile source cases will be of significance to EPA and the United States, and the DOJ supports your participation. On that basis, I conclude that the interest of the Government in your participation "outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d).

I have also determined that your acceptance of the goodwill gift which qualifies for the gift exception at 5 C.F.R. § 2635.204(c)(2)(i), would not affect your impartiality in this matter. The exception permits employees to accept opportunities and benefits, such as commercial discounts, that are "[o]ffered to members of a group or class in which membership is unrelated to Government employment." VW is providing prepaid loyalty cards and roadside assistance to all eligible affected diesel owners, and it appears that acceptance does not require that the employee agree to take any personal or official action in exchange for the gift. I have determined that acceptance of this gift would not affect your independence in the enforcement matter, that it is not likely that a reasonable person would question your impartiality in this matter, and even were there an appearance concern, the interest of the Government in your participation "outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. §§ 2635.502(c), (d).

On that basis, I am authorizing you to participate in this matter, notwithstanding potential appearance considerations. Please note that, as an official who is covered by Title I of the Ethics in Government Act, you are required to report the gift on your next financial disclosure report.

Conclusion

Based on the unique factual circumstances of your request, the interest of the United States in your expertise, your ownership of a Generation 3 vehicle, and the fact that you are

willing to forego inclusion as a member of any class action lawsuit, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1). As required, EPA has consulted with the Office of Government Ethics, and that office has no objection to the issuance of this waiver.

This waiver permits your official participation in the VW specific party matter arising under the Clean Air Act. If you have questions about this waiver, you are directed to promptly seek assistance from Justina Fugh, Senior Counsel for Ethics, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.